WM. B. STANS
OF

IN THE

Supreme Court of the United States

No. 32, October Term, 1923

WILLIAM R. WARNER & COMPANY,
Petitioner,

vs.

ELI LILLY & COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF

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INDEX

Outline of Argument.

PAGE

I. The question of Petitioner's right to manufacture its product Quin-Coco and to market it by lawful selling methods cannot seriously be controverted at this time..... 5

II. The contention that a "tasteless liquid quinine preparation was original with plaintiff" is refuted by the arguments in Respondent's own brief 14

III. Respondent did not originate the quinine, yerba santa, chocolate mixture..... 15

IV. Respondent's charges of fraudulent selling by Petitioner are not sustained by the evidence cited in support of them..... 21

V. Respondent failed to establish substantial injury by Petitioner's selling methods..... 33

—Document No. 3: The Blue List..... 49

—Conclusion: The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed..... 51

Table of Cases.

Amoskeag Mfg. Co. v. Spear, 2 Sandf, 599..... 6
Canal Co. v. Clark, 13 Wall., 311..... 6
Caswell v. Davis, 58 N. Y., 223..... 11
Cellular Clothing Co. v. Maxton & Murray [1899] A. C., 326..... 9
Chadwick v. Covell, 151 Mass., 190.....5, 8
Coco-Cola Co. v. Branham, 216 Fed., 264..... 40
Elgin Watch Co. v. Illinois Watch Co., 179 U. S., 665 8
Fairbank Co. v. Bell Mfg. Co., 77 Fed., 869.....6, 46
Flagg Mfg. Co. v. Holway, 178 Mass., 83..... 5
Hall's Safe Co. v. Herring & Co., 146 Fed., 43..... 39
Hostetter Co. v. Comerford, 97 Fed., 585..... 47
Hostetter v. Fries, 17 Fed., 620..... 10
Montgomerie v. Young Bros., 21 R. P. C., 285..... 47
Morison v. Moat, 9 Hare, 241..... 8
Peabody v. Norfolk, 98 Mass., 452..... 8
Rathbone v. Champion Co., 189 Fed., 26..... 39
Royal Baking Powder Co. v. Royal, 122 Fed., 345.. 39
Saxlehner v. Wagner, 216 U. S., 375..... 5
Singer Mfg. Co. v. June Mfg. Co., 163 U. S., 169...6, 12
Singer Mfg. Co. v. Loog, 8 App. Cas., 15..... 10
Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S., 446..... 7
Sterling Remedy Co. v. Gorey, 110 Fed., 372..... 10
Viavi Co. v. Vimedia Co., 245 Fed., 289, 246 U. S., 664 9
Wheeler & Wilson Mfg. Co. v. Shakespear, 39 L. J. Ch., 36..... 10
Williams, Matter of, 34 R. P. C., 197..... 8
Williams v. Williams, 3 Meriv., 157..... 8
Young v. Macrae, 9 Jur. N. S., 322..... 10

Witnesses of Both Parties.

Respondent's Witnesses in Roman.
Petitioner's Witnesses in Small Caps.

	PAGE OF RECORD	PAGE OF REPLY BRIEF
Albright, E. R.	236	38
Ames, W. S.	217	31, 33
Barnes, E. F.	179	29, 43
Bell, W. R.	311, 966	35, 38
Bibbins, F. E.	824, 1168	17
Blodau, G. A.	105, 523	30, 32
Bolenbaugh, J. E.	744	48
Bowden, R. D.	138	37, 40
Broussard, C. C.	134, 184	37
Burns, F. A.	170, 671	35, 39
Culver, J. W.	548	32, 45
Daly, F. R.	256	38
DEVALL, E. B.	1383	44
Eberhardt, E. G.	7	15, 16, 17
Fancher, A. C.	265	35
Fly, A.	224	35
FRITSCH, H.	1494	18, 19
Garber, A. B.	329	31, 38
Garner, A. J.	377	31, 38
Garvin, W. S.	706	48
GONZALES, H. J.	1356	29, 43
Griffin, W. L.	162	35, 37
Grigsby, R. L.	149	35
Groves, R. J.	358, 774	23, 24, 31, 33, 41, 44, 48
HAGAMAN, S. J.	1276, 1485, 1615	23, 24
Hardy, L. B.	369	3, 4, 31, 33, 38, 41, 48
Heim, W.	730	32
Henckell, H. N.	87	30
Heno, C.	201	38
Hooper, C. L.	15	21, 22, 37, 48

	PAGE OF RECORD	PAGE OF REPLY BRIEF
ames, L. S.	925	32, 44
annings, C. W.	92	19
olly, W. A.	285	31, 33
Jones, B. F.	1325, 1610	45
elton, A. L.	94, 564	3, 13, 22, 23, 30, 33, 34, 41, 43, 44
essel, M. A.	734	39, 43
essel, O. H.	69	37
inder, J. A.	81	30
nowles, A. F.	65	16, 19, 26, 30
uhn, D. J.	515	31, 48
avison, G. A.	689	32, 33, 39, 44, 45
illy, J. K.	42, 882	16, 50
indsay, W. S.	332	31, 38
ynn, C. J.	852, 935	50
McClellan, U. S.	1417	49
eCorkle, R. E.	918	32, 33, 44
eMillan, O. J.	244	31
McNulty, C. E.	1251, 1564	34, 41, 44
anning, C. O.	109	19, 30
artin, W. H.	54	30, 37
erithew, W. M.	60	19, 25, 26, 30
Merner, G. D.	1280	48
essenger, J. B.	80	37
oise, J.	641	32, 33
oseley, J. M.	276	31
elligar, F. D.	347	31
oiret, C. A.	406	31
O'Connell	973	48
eabody, E. R.	445	44, 48
erine, R. V.	658	48
Pfeiffer, G. A.	1195	36
Pfeiffer, H.	1234	41, 44
orter, C. H.	172	35
owell, W. J.	681	32, 39
rochnow, J. R.	165	27, 28, 31
ay, S. C.	210	31, 33, 43
eid, J. B.	272	31, 38
ichard, V. B.	143	19, 31, 37, 42
Rogers, C. S.	1444, 1602	43

	PAGE OF RECORD	PAGE OF BRIEF OR REP
Schaeffer, W. A.	155	16
Schuler, W. O.	162	27
Scott, W. M.	113	3, 20, 44
Shepherd, E. S.	247	30
Sinclair, A. H.	679	32
Starring, H. E.	1428, 1605	43
Stevenson, F. C.	1410	32
Stovall, E. B.	233	30
Starkey, J. R.	558	32, 33, 39
Thorburn, A. D.	31	49
Thurman, C. J.	391, 406	42, 46
Tisdale, O. C.	248	35
Turner, G. H.	384	36
Vaughan, A. L.	254	31
Vinson, J. H.	266	35
Walker, W. G.	540	3, 29, 32, 33, 39, 42
Wetzel, L. G. E.	235	35
White, E. H.	530	32, 33, 36
White, J. C.	649	32
Whitley, J. F.	387	29, 29, 36, 42
Wolsey, J. N.	77	27, 30
Wright, B. A.	69	28, 30, 37

IN THE

Supreme Court of the United States

WILLIAM R. WARNER & COMPANY, *Petitioner,* *against* ELI LILLY & COMPANY, *Respondent.*	**October Term, 1923. No. 32.**

PETITIONER'S REPLY BRIEF.

Respondent's brief apparently disregards entirely any distinction between the facts found concurrently by both the District Court and the Circuit Court of Appeals and facts as to which those two courts are at variance, and argues the entire case *de novo* from the evidence. This would seem to place an unnecessary burden upon this Court. However, we shall, as briefly as possible, discuss the points raised in the Respondent's brief.

The so-called facts which Respondent contends the evidence shows beyond any doubt, almost without exception are challenged by Petitioner as not being supported by the evidence. There is scarcely one of the propositions enumerated on pages 5, 6, and 7 of Respondent's brief which, to say the least, does not depend upon weighing conflicting evidence and drawing deductions from such conflict.

The real basis of complaint upon which Respondent's entire case is predicated, may be found in two letters addressed by Mr. J. K. Lilly, President of Respondent Company, to Mr. G. A. Pfeiffer, Treasurer and General

Manager of William R. Warner & Company, the first bearing date August 31, 1909, in which Lilly writes asserting a claim to originality in the preparation of Coco-Quinine, and says:

> "While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion" (Rec., Vol. III, p. 1214).

In the second letter, dated January 11, 1910, he repeats his complaint that Petitioner was pushing the sale of Quin-Coco in competition with Respondent's Coco-Quinine, and says:

> "You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.
>
> • • • • • • • • • •
>
> "If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles" (Rec., Vol. III, p. 1217).

After a careful consideration of the Respondent's brief, together with the evidence, the case presented appears to be this:

A first class manufacturing drug concern (one of the six leaders according to the Respondent's own witness, *infra*, p. 48), is charged by a competing house with grossly "unfair" methods in the sale of one small item, Quin-Coco, out of its 5,000 drug items. The apparent profit on this item was perhaps $1,000. a year on a gross business of $2,600,000.

The Respondent, with 145 traveling salesmen visiting all of the retail druggists in the country (53,773) several times a year for seven years, produced as witnesses to prove its charges of this fraudulent conduct on the part of the Petitioner, some 22 druggists. Of these, all but two (Walker and W. G. Scott), whatever their testimony in chief was, broke down on cross-examination, thereby entirely failing to sustain the averments of the bill.

Petitioner's usual sales force was 75. They had a total of 313 different salesmen in their employ during the seven years in question. These salesmen likewise visited the 53,773 retail druggists from four to six times a year for seven years.

The Respondent called certain witnesses who had been formerly salesmen of the Petitioner, in order to prove that the officers and sales managers of Petitioner had given them unethical instructions concerning the sale of Quin-Coco. All of these witnesses either proved nothing substantial or else broke down on cross-examination, except Hardy. The principal one, Kelton, testified to "absolutely ethical teaching."

On the other hand, the general officers, the sales managers and the salesmen, all (except the salesmen who had gone over to the Respondent) testified that the Petitioner's training of its salesmen had been ethical and none of

the others but Hardy, gave evidence tending to prove the contrary.

All or nearly all of the witnesses were more or less stale, and testified to conversations which had taken place from a few months to nine years previously.

The testimony of all of these impugning witnesses was unqualifiedly denied by the officers, sales managers and salesmen referred to (except in the cases of Gill, whose mind had become impaired, and of the former salesmen who had gone over to the Respondent's side and testified for it).

Not only were the witnesses mostly stale, but it appeared that the Respondent for seven years, and until the bill was filed, never complained to Petitioner about its alleged unfair selling methods, although it had ample means to have ascertained all the facts if there were any, and although in 1909 it did complain that Petitioner was selling Quin-Coco at prices under those of Coco-Quinine.

The District Court, after a careful consideration of the proofs, dismissed the bill, finding that there was no evidence of unfair selling, but the Circuit Court of Appeals found the contrary and enjoined the Petitioner from the use of chocolate, although expressly stating that that right was open to all the world except the Petitioner.

The case has gone far beyond a mere question of the right to sell this relatively unimportant item. It has become a question of an unwarranted attack by one drug house upon the moral character of its competitor, a concern of high standing in the business.

I.

The question of Petitioner's right to manufacture its product Quin-Coco and to market it by lawful selling methods cannot seriously be controverted at this time.

That right is settled by an unbroken line of cases, among which are the following:

Saxlehner v. *Wagner*, 216 U. S., 375, 380, 381, was a suit to enjoin the defendants from the use of "Hunyadi Janos" or "Hunyadi" as a name for its artificial water. The opinion of the Court affirming a decree below dismissing the bill, was rendered by Mr. Justice HOLMES, who said:

> "We see no reason for disturbing the finding of the courts below that there was no unfair competition and no fraud. The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood *what they are copying and trying to sell.* But the plaintiff *has no patent* for the water, and the defendants *have a right to reproduce it as nearly as they can.* They have a right *to tell the public what they are doing* and to get whatever share they can in the popularity of the water by advertising that they are *trying to make the same article* and think that they succeed. If they do not convey, but, on the contrary, exclude the notion that they are selling the plaintiff's goods, *it is a strong proposition that when the article has a well-known name they have not the right to explain by that name what they imitate.* By doing so they are not trying to get the good will of the name, *but the good will of the goods.* See *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83, 91; *Chadwick* v. *Cov-*

ell, 151 Massachusetts, 190, 191. Although the application is different, the principle seems to be similar to the rule that when a patent has expired descriptive words or even an arbitrary or personal name by which it has become known may be used if sufficient precautions are taken to prevent the public from being deceived. See *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S., 169.

"The plaintiff says that no one can succeed in imitating a natural water. *But all are free to try.*" (Italics ours.)

See also *N. K. Fairbank Co.* v. *Bell Manfg. Co.*, 77 Fed., 869; C. C. A., 2nd Circ., LACOMBE and SHIPMAN, C. JJ.

The decree there expressly provided that the defendants should not be enjoined from "making a powder having the appearance of complainant's 'Gold Dust.'"

Canal Co. v. *Clark*, 13 Wall., 311, was a case on Lackawanna coal, in which Mr. Justice STRONG wrote the opinion. He said (pp. 323-324, 327):

"And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark, or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, *or a name merely descriptive* of an article of trade, of its qualities, *ingredients*, or characteristics, be employed as a trade mark and the exclusive use of it be entitled to legal protection. As we [misprint for "was"] said in the well-considered case of *Amoskeag Manufacturing Co.* v. *Spear* (2 Sandf., 599), 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive

use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, *others may employ with equal truth,* and therefore have an equal right to employ for the same purpose.' [Citing many cases.]

* * * * * * * *

"True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but *if it is just as true in its application to his goods* as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." (p. 327.)

Standard Paint Co. v. *Trinidad Asphalt Co.,* 220 U. S., 446, 461, was an unfair trade case on rubber roofing—"Ruberoid."

The fifth paragraph of the syllabus:

"The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and this cannot be predicated solely on the use of a trade-name *similar to that used by plaintiff if such trade-name is invalid as a trade-mark.* To do so would be to give the plaintiff's trade-name full effect of a trade-mark notwithstanding its invalidity as such." (Italics ours.)

The opinion (McKenna, J., at p. 461):

"The only imitation by the asphalt company of the roofing of the paint company is that which exists in the use of the word 'rubbero,' and this only by its asserted resemblance to the word 'rub-

eroid.' To preclude its use because of such resemblance would be to give to the word 'ruberoid' the full effect of a trade-mark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S., 665, 673."

ANY ARTICLE (NEW OR OLD) NOT PROTECTED BY LETTERS PATENT IS OPEN TO ALL THE WORLD TO SELL.

Chadwick v. *Covell*, 151 Mass., 190; 6 L. R. A. 839.

Dr. Spencer had a secret formula for "Dr. Spencer's Queen of Pain." The defendant (having discovered the formula without any breach of trust) manufactured the article and put it on the market.

Mr. Justice HOLMES said, in rendering the judgment of the Supreme Judicial Court of Massachusetts (p. 191):

"So far as the right to manufacture and sell the medicines goes, the plaintiff's case may be disposed of in a few words. Dr. Spencer had no exclusive right to the use of his formulas; his only right was to prevent any one from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. *Peabody* v. *Norfolk*, 98 Mass., 452, 458; *Morison* v. *Moat*, 9 Hare, 241, 263; *Williams* v. *Williams*, 3 Meriv. 157."

Matter of Williams, 34 R. P. C., 197:

Before Lord COZENS-HARDY, M. R., WARRINGTON, L. J., and LAWRENCE, J.; see especially the opinion of LAWRENCE, J.

The plaintiff made and sold a new confection of chocolate and macaroons, under the name of "Chocaroons." It was *held* that it was a new product and a new name, which was open to any person, and that any person could make and sell it, *using the plaintiff's name "Chocaroons"*; that the name was not used to distinguish plaintiff's make from others but to distinguish the particular sweetmeat; and that if others were debarred from using the name (*while having the right to make the thing*) they would be debarred from selling it, because the public would refuse to buy it except under the name by which they knew it. Thus the defendant would secure a monopoly in the goods by having a monopoly in the name. See especially the opinion of WARRINGTON, L. J.

Cellular Clothing Co. v. *Maxton & Murray* [1899] A. C., 326, 344 (House of Lords):

Before the EARL OF HALSBURY, L. C., LORD WATSON, LORD SHAND and LORD DAVEY:

> "But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, *although they are entitled to do so*, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: *all the world may make the article, and all the world may tell the public what article it is they make* and for that purpose they may *prima facie* use the name by which the article is known in the market." (*Per* LORD DAVEY; italics ours.)

Viavi Co. v. *Vimedia Co.*, 245 Fed., 289, C. C. A., 8th Circuit, certiorari denied, 246 U. S., 664:

The Viavi Company sold a line of medicinal goods such as "Viavi Capsules" and "Viavi Laxatives," etc.

The defendant sold another such line under the name "Vimedia."

Held, that in the absence of such a monopoly as a patent confers, any persons may produce the articles, if they can, and may sell them under the representation *that they believe they are the same article,* if they exclude the notion that they are plaintiff's goods.

Hostetter v. *Fries,* 17 Fed., 620, S. D. N. Y.:

WALLACE, J., at pp. 621-622:

> "The complainants have neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell bitters by the name of Hostetter's Bitters. The preparation never had any name until it was offered to the public and christened. When a new article is made a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. If this were not so any person could acquire the exclusive right to a formula by giving a name to the compound produced, not only when the compound has not been patented, but when it might not be the subject of a patent. All who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller and not the preparation made by another. * * * A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured. *(Singer Mfg. Co.* v. *Loog,* 8 App. Cas., 15; *Wheeler & Wilson Mfg. Co.* v. *Shakespear,* 39 L. J. Ch., 36; *Young* v. *Macrae,* 9 Jur. N. S., 322.)"

Sterling Remedy Co. v. *Gorey,* 110 Fed., 372, N. D. Ohio, E. D.:

Case of "unfair" competition on "cascarets," a laxative remedy containing the drug "Cascara," combined with other ingredients. Held:

> "The word 'Cascara' is the name of a drug generally known as a good laxative, and the defendant should not be enjoined from using that name. * * * The defendant may sell tablets which are compounds of cascara, and, in appropriately naming them, he may use the word 'Cascara,' and the decree of injunction in this case must not be so sweeping as to prevent the defendant from so doing." (pp. 373-374.)

Caswell v. *Davis*, 58 N. Y., 223, 234:

The plaintiff's article was a medicine composed of iron, phosphorus and calisaya bark, sold under the name of "Ferro-Phosphorated Elixir of Calisaya Bark." The defendant began to sell the preparation under the same name. An injunction was refused below, which disposition of the case was affrmed on appeal.

The Court, by FOLGER, J., said:

> "*It is a right which everyone has*, and from the exercise of which he may not be debarred, to make an article of the same ingredients, of the same composition and of as good quality as that made by another, *when that other has no exclusive privilege of manufacture conferred by law.* Having this right to make, he has also the right to indicate the ingredients, the composition and quality of that which he has made, by any usual words or phrases apt therefore. Hence, when he adopts usual phrases which do no more than this, he but takes from a stock common to all mankind, and does not infringe upon any exclusive right of another, who has, before that, used the same or like words or phrases. Nor can the first user avoid this result, *by coupling with his purpose to indicate quality and characteristics, a purpose also to indicate origin.* Though he have that purpose also,

and the form of words used by him have also that effect, inasmuch as he cannot be given the exclusive use, without impairing the right of another, *the exclusive use will be denied.*" (Italics ours.)

As to the rule in expired patent cases referred to by Mr. Justice Holmes, it is hardly necessary to observe that the leading case is

Singer Manfg. Co. v. *June Manfg. Co.*, 163 U. S., 169, 199.

The opinion of the Court was delivered by Wnite, J. He said:

"The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and, therefore, that the name must be accompanied *with such indications* that the thing *manufactured* is the work of the one making it, as will unmistakably inform the public of that fact." (Italics ours.)

There is no need for argument that the name of Respondent's article has not acquired a secondary meaning. The only relevant issue of fact therefore is the question whether Petitioner's selling methods were fair or not. If, on that issue, the Court shall reverse the Circuit Court of Appeals, no other question remains to be decided. This being so, a very large part of Respondent's brief is irrelevant. For instance, pages 11 to 39: The statement, even if proved, that Quin-Coca is inferior to Coca-Quinine is equally irrelevant. A few witnesses—perhaps half a dozen—make the statement, but it is merely an expression of opinion, with no reasons given. Testimony to the contrary is given on behalf of Petitioner and especially by Kelton (XQ38, Rec., Vol. I, at p. 249), one of Respondent's witnesses.

Equally irrelevant is evidence of the origin of Coca-Quinine and of experiments made in reaching the formula for it; and of the fact that the Petitioner in some way discovered the Respondent's formula (which is not proved). All we need to know is that the Respondent selected quinine, yerba santa and cocoa (ingredients common to all), and the Petitioner, as its right was, selected the same ingredients. As to how either of them "compounded" them is not important. The alleged experiments of the Petitioner at Philadelphia, which, we admit, are disproved, are not relevant even if they occurred. The Petitioner was within its right in making a similar article.

Although we regard most of Respondent's contentions as wholly irrelevant to the only question before this Court we shall discuss with as much brevity as possible the points advanced on its behalf.

II.

The contention that a "tasteless liquid quinine preparation was original with plaintiff" is refuted by the arguments in Respondent's own brief.

It is argued that Respondent sought a palatable liquid preparation, and to meet the demand for it, Coco-Quinine was developed. Obviously, a *palatable* liquid quinine preparation could not be *tasteless*.

The whole of Respondent's complaint was based upon the fact that Petitioner was making substantially the same article as its Coco-Quinine, and selling it at a lower price. There was prior to this suit no contention by Respondent that these sales were occasioned by any other method than a difference in price, and if Petitioner had been willing to raise its price to meet that of Respondent, this law suit never would have been brought. The *only* basis for such request was that Respondent was the first to produce a liquid preparation containing quinine sulphate in definite proportions, with the bitterness of the quinine disguised by yerba santa and chocolate, and that it had a common law right to the exclusive control of that product; also that the name Quin-Coco was an invasion of a trade-mark right of Respondent in the name of Coco-Quinine. Both of these contentions have been disposed of adversely to the Respondent by both the District Court and the Circuit Court of Appeals. Nevertheless, the Respondent seeks to re-argue both propositions in this court.

III.

Respondent did not originate the quinine, yerba santa, chocolate mixture.

Prior to Coco-Quinine, Respondent's brief continues (p. 11),

> "both plaintiff and defendant had a preparation on the market which druggists used for preparing extemporaneous mixtures of quinine sulphate in liquid form, the Lilly preparation being known as Yerbazine and the defendant's preparation as Quinamel."

This amounts not merely to an *admission*, but to an *assertion* that a tasteless liquid quinine preparation was not original with Petitioner, but that both parties had developed such a product.

Eberhardt, Respondent's chemist, testified that in these original preparations, yerba santa was used to disguise the bitterness of the quinine. (Rec., Vol. I, pp. 8, 13.)

There is not even a suggestion in the evidence that this preparation was original with Respondent.

The statement that Coco-Quinine was the first medicine of permanent character consisting of a mixture of liquid syrups, preservatives, yerba santa for disguising the bitterness of the quinine, and quinine sulphate, is at variance with the undisputed evidence referred to on pages 25-28 of Petitioner's original brief. This evidence is not controverted by the testimony of witnesses—mostly retail druggists—referred to on pages 12 and 13 of Respondent's brief. That testimony amounts to nothing more than that the witnesses respectively did not know

of any other preparation. Thus, for example, take the witness Knowles:

> "Q14. Did you ever know of a chocolate quinine preparation prior to your knowledge of the Lilly product? A. No." (Rec., Vol. I, p. 66.)

Or the witness Schaeffer:

> "Q8. Did you have any knowledge of another Coco-Quinine or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.? A. No, sir." (Rec., Vol. I, p. 156.)

Nor is this testimony broadened in its application by the evidence of Eberhardt, Respondent's chemist, who testified to working out, towards the close of 1899, under instructions from Mr. J. K. Lilly,

> "a syrup containing quinine which would be as palatable as I could make it, to be put upon the market as a liquid preparation of quinine," (Rec., Vol. I, p. 8)

in the development of which he made the product now known as Coco-Quinine. The statement he made of adding chocolate as a means of giving

> "a distinctive color and a characteristic appearance and furthermore to keep in better suspension the material in the preparation," *(Ibid.)*

does not at all militate against the evidence referred to above (Petitioner's brief, pp. 25-28), showing that chocolate had been used for this purpose as far back as 1873. Nor does the testimony of Mr. J. K. Lilly alter the situation, being merely to the effect that in order to create "a palatable liquid preparation of quinine," he caused the mixture of quinine, yerba santa and chocolate to be made which he began to market in 1900 and which is now known as Coco-Quinine (Rec., Vol. I, pp. 42-43).

Dr. Eberhardt's contention (see Respondent's brief, pp. 13-16) that he employed chocolate to give the preparation *"a distinctive color and pleasant flavor,"* renders quite unnecessary all the testimony and the elaborate contention going to show that chocolate is a negligible agency in the preparation, or that other syrups than chocolate might be employed to give a different color and an equally palatable but different flavor to the mixture. So long as these simple, well known substances, quinine, yerba santa and chocolate, are open to all the world to use in such mixture as is found palatable, it makes no difference what other substance might be found to conceal the bitterness of quinine, or to impart a pleasant but different flavor to the mixture. Francis E. Bibbins, director of Respondent's pharmaceutical department, also admitted on cross-examination that the cocoa in Coco-Quinine is itself a suspending agent; that is that cocoa plays the three-fold part of giving color, flavor and suspending qualities (Rec., Vol. II, p. 832, XQs25, 26). Eberhardt's testimony is to the same effect (Rec., Vol. I, p. 12, XQ31, p. 13, RXQ39).

Both the District Court and the Circuit Court of Appeals agree that the Respondent has no exclusive right to the formula of its preparation; that anyone else might duplicate it by a preparation of his own, and offer it to the trade in competition with Respondent's preparation. We shall later deal with the objection which the Circuit Court of Appeals found to the *"manner* in which" Petitioner exercised its legal right.

Much is made by Respondent of the contention that in preparing its product, Petitioner endeavored to give it the same color and flavor as Coco-Quinine.

> "Admittedly," says the Circuit Court of Appeals, "the plaintiff has no monopoly in its formula nor has it an exclusive right to the use of any of its ingredients." (Rec., Vol. III, p. 1659.)

See also cases cited *supra*.

Therefore, even if Petitioner had sought to copy exactly the coloring and taste of Respondent's product, it would have been within its rights, but that it did so is vigorously denied by abundant evidence. Fritsch, the foreman of the wet goods department, the manufacturer of liquid preparations of the Petitioner Company in Philadelphia, testified to experiments made in 1907 and 1908, in the effort to make a tasteless syrup of chocolate quinine. These experiments were not successful and the matter was dropped (Rec., Vol. III, pp. 1495, 1499, 1503). This was before the Pfeiffers took over the Warner business (July, 1908).

Quin-Coco had previously been manufactured (1906) by the Searle & Hereth Company, an Illinois corporation, with laboratories in St. Louis, Missouri, and marketed in the fall of that year by the Pfeiffer Chemical Company (Rec., Vol. III, pp. 1196, 1228). In July, 1906, the Pfeiffer Chemical Company, a Pennsylvania corporation, acquired control of the Searle & Hereth Company (Rec., Vol. III, pp. 1196, 1228). In July, 1908, the Petitioner corporation, William R. Warner & Company, was organized under the laws of Pennsylvania and took over the old Philadelphia firm of the same name. The persons who organized that corporation, H. Pfeiffer, G. A. Pfeiffer and G. D. Merner, owned the Searle & Hereth Company and the Pfeiffer Chemical Company, and now own a majority of the capital stock of all three companies (Rec., Vol. III, p. 1234, Q4; p. 1241, XQs39, 42; p. 1227, XQs217-218). Since the organization of the Petitioner corporation in 1908, the Searle & Hereth Company, in addition to maintaining its laboratory at St. Louis, Missouri, also has had a laboratory in Philadelphia, in the same building with Petitioner corporation (Rec., Vol. III, p. 1227, XQs220, 223). From that date Quin-Coco has been manufactured

at the Philadelphia laboratory, as well as in St. Louis, by the Searle & Hereth Company.

Fritsch testified that no Quin-Coco was made in Philadelphia until March, 1909. He said that in that month he got his formula from St. Louis and made his first batch of Quin-Coco, comparing his product with the bottle of the product made by Searle & Hereth Company at St. Louis. He further testified that in making that product, he made no effort to standardize the color of the cocoa; that there are variations in color between the different batches (Rec., Vol. III, pp. 1494, 1498).

Respondent cites the testimony of a large number of witnesses to show that the preparation is dispensed by druggists, both when prescribed by physicians and when called for by customers; that it is sold by the manufacturers to the drug trade in bulk packages and the druggist dispenses the same in his own prescription bottle filled out of these bulk packages (Respondent's Brief, pp. 29, 30), and, therefore, there is a necessity for some medium *in the preparation itself* to distinguish and identify its originality (pp. 28, 29). But almost every one of the witnesses whose testimony is cited in support of this proposition, also testified that he sold the product over his own counter on the application of purchasers, sometimes on calls for Coco-Quinine (Merithew, Rec., Vol. I, p. 61), sometimes on call for chocolate quinine (Jennings, p. 93; Manning, p. 110; Richard, p. 144), and

> "some even go as far as 'syrup of quinine, brown color', depending upon the education of the customer" (Knowles, Rec., Vol. I, p. 66);

or again as "sweet quinine" (Wright, p. 69). Respondent's argument would prohibit the sale of any medicinal preparation of the same color as another in competition with it, irrespective of the formula of its

make-up, simply because it is possible to palm off one liquid of a given color for another of the same color, which might be made on a totally different formula. This would be a rather novel means of establishing a monopoly, and quite at variance with the authorities above cited as well as the conclusions of both the courts which have thus far passed upon this case, to the effect that Respondent has no exclusive right to the formula of its preparation, and, therefore, it was open to Petitioner to duplicate it by a preparation of its own, and to offer it to the trade in competition.

The testimony going to show efforts made by Petitioner to copy the exact color of Respondent's Coco-Quinine in the manufacture of Quin-Coco, was all disputed, but even if true, it was wholly immaterial, if the law be as laid down by both the District Court and the Circuit Court of Appeals. Chocolate is chocolate; a well-known substance employed as food and medicine. It has a distinctive color. Probably the whole range of variety of shade when put in solution would not enable one chocolate connection to be differentiated from another. If, as the uncontradicted evidence shows, chocolate was used in connection with quinine as a means of making the taste of quinine more palatable years before Respondent made its connection Coco-Quinine, it certainly was open to Petitioner to use the same substance for a like purpose, and a similarity of appearance is wholly immaterial.

IV.

Respondent's charges of fraudulent selling by Petitioner are not sustained by the evidence cited in support of them.

Respondent's contention that Petitioner sold its product Quin-Coco in the trade,

> "representing to the drug trade that it was identical with Lilly's Coco-Quinine, not only in therapeutic value but in color and flavor, and that it could be dispensed on physicians' prescriptions written for Coco-Quinine as well as in response to calls over the counter for Coco-Quinine 'without detection' or 'without anyone being the wiser,' holding out as the inducement for the perpetration of the supposed fraud that the druggist could make more money by handling Quin-Coco which defendant was selling at $1.30 per gallon below the price of Coco-Quinine,"

that many retail druggists yielded to this persuasion and the temptation for larger profits, purchased Quin-Coco from Petitioner and used it as suggested in supplying a demand for Coco-Quinine (Respondent's Brief, pp. 5, 6), rests upon the meagre evidence which has been analyzed and commented upon in our principal brief (pp. 29-33, 34 *et seq.*). Respondent contends that these conclusions are established "beyond question by a multitude of witnesses."

As a matter of fact, practically every witness who testified up to Respondent's full contention broke down on cross examination and, as above stated, was contradicted flatly by at least one and sometimes two witnesses for Petitioner. Almost all of the testimony failed to come up to Respondent's requirements. The witness Hooper did not testify that he was told to advise druggists they could use Quin-Coco to fill prescriptions for

Coco-Quinine. He said his instructions from Stevenson, the representative of the Pfeiffer Chemical Company, were "to sell Quin-Coco as a substitute product for Coco-Quinine." Stevenson denied giving these instructions (Rec., Vol. III, p. 1411). Hooper said,

> "In making my sale of Quin-Coco I told the druggists that it was exactly the same as Coco-Quinine made by Lilly & Co.," etc. (Rec., Vol. I, pp. 15-16.)

This was his voluntary statement, not made under instructions from his employer or the employer's representative (p. 15) and contained nothing untrue or improper. So, Kelton's testimony quoted on page 42 of Respondent's Brief was no evidence of fraud, as Quin-Coco properly could be sold to supply the demand for Coco-Quinine, if no deception were practiced. (See Rec., Vol. I, p. 101, XQ41.) Kelton, a former employee of Petitioner, called by Respondent, on cross examination said:

> "I have previously stated that I believed then and believe now that Quin-Coco was and is a superior preparation to Coco-Quinine manufactured by Eli Lilly & Co. The price also as above stated was the chief club I used with which to hammer against Coco-Quinine" (Rec., Vol. I, p. 100, XQ34)*.
>
> "XQ41. In answer to XQ29, you have specified that by 'replacer' you mean a preparation 'which in class and quality was similar to the original.' Could not a druggist honestly use Quin-Coco as a 'replacer' for Coco-Quinine by getting the consent of a physician who has prescribed Coco-Quinine, to use Quin-Coco? And, when a customer ever

*It will be remembered that the lower price was what Mr. Lilly complained of in his letters to Mr. Pfeiffer quoted on pages 1 and 2 of this brief.

the counter called for Coco-Quinine, explaining to such a customer that Quin-Coco was a better preparation and did not coagulate?

"A. That would be a matter left entirely with the druggist. My business was to sell Quin-Coco in the place of Coco-Quinine. How he sold the preparation was entirely optional with him. My own sales to the druggists were open and above board and nothing whatever in the way of a clandestine nature was between us.

"As above stated, I invariably demonstrated the difference between Quin-Coco and Coco-Quinine, stating as I have time and time again that I believed and still believe that Quin-Coco is a superior preparation to Coco-Quinine. If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine" (p. 101).

"XQ43. If you will pardon me, I now ask you whether you suggested to retail druggists that they could buy Quin-Coco and handle it and 'palm' it off over the counter to customers calling for Coco-Quinine? A. If you call buying a better preparation and making more profit on said preparation than the one called for, I answer that I invariably suggested to the druggist to show the Quin-Coco in place of Coco-Quinine, but at no time, as above stated, did I ever suggest to 'palm off' said Quin-Coco instead of the original product known to the trade as Coco-Quinine" (Rec., Vol. I, p. 102).

The witness Groves' testimony, referred to on page 42 of Respondent's brief, that he heard Hagaman (Petitioner's sales agent) tell a druggist that Quin-Coco could be sold as Coco-Quinine and advise druggists to buy Quin-Coco and substitute it on calls for Coco-Quinine was directly contradicted by Hagaman (Rec., Vol. III, p.

1491). On re-cross examination, Groves testified as follows:

> "RXQ93. Will you swear that you ever heard Hagaman say to a druggist that he could buy Quin-Coco and substitute it on calls for Coco-Quinine? A. I have heard him tell druggists that Quin-Coco could be sold as Coco-Quinine, but where I cannot say.
>
> RXQ94. Can you swear that you ever heard Hagaman advise a druggist to buy Quin-Coco and substitute it on calls for Coco-Quinine? A. Yes.
>
> RXQ95. What did he say to them? A. That Quin-Coco was a similar product to Coco-Quinine, containing the same amount of quinine and was like it in appearance.
>
> RXQ96. That is what he said, is it? A. That is what we all said. That was our only method of selling it.
>
> RXQ97. And that is what Hagaman said? A. He could say nothing else.
>
> RXQ98. And that is what you used to say? A. Yes, it being the only selling point we had" (Rec., Vol. I, p. 368).

Respondent contends (Brief, p. 45), that the testimony reviewed shows that defendant's purpose in duplicating plaintiff's Coco-Quinine, particularly as to its non-essential physical characteristics imparted to it chiefly by the use of chocolate as a coloring and flavoring medium, was to take from Respondent and appropriate to Petitioner a large part of the market for Coco-Quinine, etc.

But if, as the District Court has held,

> "* * * the defendant had a lawful right to reproduce the plaintiff's preparation; to tell the plaintiff's customers that it was essentially the same as the plaintiff's product in composition and therapeutic effects; and to sell it as a substitute for the plaintiff's product * * *.

> "The plaintiff has no exclusive right in the color and flavor inevitably following the use of cocoa or chocolate which the defendant had a right to combine with quinine in a pharmaceutical preparation.
>
> "The defendant had a lawful right to call its preparation Quin-Coco, which is a descriptive name of the same effect as Coco-Quinine" (Rec., Vol. III, p. 1651),

then whether the evidence establishes what the Respondent contends or not is wholly immaterial, for Petitioner was within its legal rights.

Respecting the further evidence resting upon the testimony of "numerous retail druggists," Respondent seeks to impute to Petitioner the dishonesty of a few druggists selected from among thousands scattered throughout the country, on the theory that by producing a competitive identical article, Petitioner put it in the power of dishonest men to practice unfair competition. If the articles are identical and the Respondent has no exclusive right to the manufacture of one of them, Petitioner cannot be held responsible for the acts of dishonest dealers, and Respondent has no right to complain of competition, even though as an incidental result, dishonest dealers may reduce Respondent's sales or supplant its products. There is the same danger in all competition.

The wholesale generalization of the testimony of the retail druggists produced as witnesses by the Respondent, given on page 54 of Respondent's brief, goes beyond the actual testimony given by them. Merithew, whose testimony is summarized on page 47 of the brief, testified on direct examination that Starring, one of Petitioner's representatives, told him that Quin-Coco could be dispensed when Coco-Quinine was called for; but on cross examination he could not give the exact words used. The conversation, as nearly as he could remember it, was

a year and six months before he testified. He said (XQ29):

> "A. I cannot state his exact words, *but he referred to me* that Quin-Cuno was lower in price than Cuno-Quinine, and therefore several of the druggists were dispensing it in the cities of Michigan which I heretofore named.
>
> XQ30. And that is the substance of what he said to you? A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through" (Rec., Vol. I, pp. 62, 63; italics ours).

The testimony of the witness Knowles, quoted on page 49 of Respondent's Brief was elicited in the following manner:

> "Q28. Have you ever heard of a product called Quin-Cuno, and, if so, what can you tell us with reference thereto? A. A representative of William R. Warner & Co. introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Cuno-Quinine when I could use his product at a cheaper price.
>
> Q29. Use his product for what purpose? A. For dispensing purposes, and also to sell on call.
>
> Q30. On call for what?" (Rec., Vol. I, p. 66.)

This was objected to as leading. The question was restated, and the witness said:

> "A. For Cuno-Quinine or chocolate quinine, syrup quinine or where the syrup of quinine is used.
>
> Q32. Under what name is such a product as you have referred to usually called for in prescriptions and by customers at your store? A. The prescription Cuno-Quinine. Over the counter or call, Cuno-Quinine, chocolate quinine, and some even go so far as 'syrup of quinine, brown color,' depending upon the education of the customer" (*id.*, p. 66).

On cross examination, Knowles was asked to state the salesman's exact words with reference to selling his product on call, etc., to which he answered (R. 29):

> "A. He took a sample of Quin-Cure from his grip and asked me if I handled that product. I said 'No, I have always used Cinco-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage?' I said I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the Cinco-Quinine.' Then he stated the price that I was paying for the Cinco-Quinine and that I could use his product and save the difference. I told him 'no, I will continue with the Cinco-Quinine as it always gave the best satisfaction.' * * * That was all on that subject" (Res., Vol. I, p. 67).

So, the testimony of the witness Wolsey, referred to on page 40 of Respondent's brief, on cross examination came down to a statement of the exact words used by Petitioner's salesman as being:

> "I would like to sell you a gallon of Quin-Cure. It would be cheaper for you to use than Cinco-Quinine and you would make more money off it" (Res., Vol. I, p. 79).

The summary of the testimony of the witness Proctor now on page 41 of Respondent's brief, gives a very inaccurate impression of the witness itself, which was the following:

> "Q12. Have you ever been solicited to buy Quin-Cure, and if so by whom and what inducements were held out as a reason for such a purchase?
>
> * * * * * * *
>
> A. Yes, William R. Warner & Company's salesman solicited my order and the inducement was the price.

Q15. What else was said by William R. Warner & Company's salesman? A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q16. Did he say anything about what use you could make of it?

By Mr. Keefe: Objected to as leading.

A. He intended me to use it instead of Coco-Quinine.

By Mr. Keefe: The answer is objected to as not stating what the salesman said.

Q17. What do you mean by 'instead of Coco-Quinine'?

Same objection as to the last question and as not calling for testimony as to what was said.

A. When I got a call for Coco-Quinine or a prescription, that it could be used instead" (Rec., Vol. I, pp. 100–107).

On cross examination, witness undertook to give the exact language used by petitioner's salesman, Richards, as follows (R. 107):

"A. Well, he told me that — he asked me whether I was using much Coco-Quinine. If I did he could save me some money on it. He said he had this Coco which was the same thing as Coco-Quinine and he then gave me the different prices between Coco-Quinine and this Coco" (Rec., Vol. I, p. 107).

Whitley, whose direct testimony is referred to as part of respondent's brief, on cross examination put a very different complexion upon it. He admitted that what the salesman told him was that this Coco was identical in every respect with Coco-Quinine, no differ-

ance whatever, and that was really all he told him, except that he said witness would save money by using it, and could dispense it the same way, as calls for Coca-Quinine (3,998):

> "3,997. He told me that I could use it and that they were using it all over his territory for Coca-Quinine.
>
> 3,998. Then by that he meant that it was taking the place of Coca-Quinine in his territory? A. It would appear to me that he was selling it and they were using it in place of Coca-Quinine" (Rec., Vol. I, pp. 390-391).

We have stated above, that all of the druggist witnesses were also called by Respondent to prove unfair selling methods broke down on cross examination. One of the exceptions was W. G. Walker. He was a clerk in Whitley. He testified [illegible] years after the conversation to referred to. He was a drug clerk in a village in Louisiana, and he was only a listener to a conversation with his employer when Petitioner's officers, White, called. Whitley, his employer, had been examined. His testimony was harmless. Walker, furthermore, was called in rebuttal to testify to matters which ought to have been in Respondent's opening proofs (Rec., Vol. II, p. 91; see infra, p. 31).

Barnes was a druggist in a village in Mississippi. He did not remember the date of the interview with Petitioner, the Wharton salesman. He testified to one (1,999) that the salesman "never" had given Coca should be dispensed upon prescriptions originally written for Coca-Quinine.

Reynolds was a registered pharmacist. He had testified for the Parke-Davis Company at Detroit, and for 16 years had traveled for large firms. He was a trained man in selling and reading drugs. He denied the statements of Barnes (Rec., Vol. II, pp. 100, [illegible]).

Respondent, on pages 16 and 17 of its brief, seeks to summarize the purport of testimony given by the witnesses enumerated on pages 12 and 13. In so doing, there is presented a totally erroneous view of the evidence, of the weight of the evidence, and of what actually was established by the evidence. The following is a brief summary of what each of the witnesses enumerated did testify at the place indicated in Respondent's Brief. Even this, is without showing how the testimony there given was affected by cross examination or otherwise. In our principal brief we have analyzed more carefully and with discrimination the character of these witnesses and the nature of their testimony.

The testimony of what the witnesses testified was said to them by Petitioner's salesmen to induce them to buy Quin-Ozon, at the places referred to, is as follows (the figures refer to the pages of the Record):

Martin, p. 9; 10. Statements to him of druggists and customers of wonderful substitution by druggists. Nothing to mislead Petitioner.

Matthews, p. 9; 10-11. Hearing "referred to as that Quin-Ozon that burns to order," etc.

Fincher, p. 11. Preferred it on own demand.

Wright, p. 11; 12-13 and 15. Quin-Ozon druggists could make more money.

Wright, pp. 11-12; 14-15. Same (own case) & Quin-Ozon burning and druggist.

Knight, p. 9; 10. Same; salesman stated Quin-Ozon could be used in place of Quin Sputum and money saved.

Hancock, pp. 9-10; 12-13. Same (Quin-Ozon could be used in C. and C. same as Quin and druggist.

Fulton, p. 9; 12. Same (Quin-Ozon and druggist thicker, pp. 10-11; 12-13). Same (Quin-Ozon druggist and in place of Quin Sputum).

Shannon, p. 11; 13. Same (Quin-Ozon druggist thicker, p. 11; 13-14). Same (Quin-Ozon druggist

Bidwell, p. 105, Q. p. 145, 2,919. Quin Cure better and cheaper.

Pendleton, p. 106, 3,212-13. Quin Cure cheaper.

Hoe, p. 110, 37; 3,311, 4,018. Quin Cure to be used in place of Cin Quinine and cheaper. At p. 115, 3,559. Qin Cure could be dispensed when Chemists Quinine or Cure Quinine called for.

W. & Sons, p. 91, 2,910-12. Told that Quin Cure could be dispensed on calls for Cure Quinine.

McMillan, p. 106, p. 146, 3,925. Told that Cin couldn't tell difference between them.

Vaughan, p. 108, 3,012. Demonstration by substitution by mixing two products on paper.

Bell, p. 111, 3,1017. Representation that Quin Cure was same Cure Quinine and cheaper.

Morton, p. 117, 38. Quin Cure similar to Cure Quinine—very in price.

Bell, pp. 109-110, 3,1-40. Quin Cure could be sold for Cin Quinine.

Barker, p. 109, 33. Quin Cure used on account of cheapness.

Linton, p. 113, 17, p. 118, 3,598. Quin Cure same as Cure Quine and costs less.

Williams, p. 120, 19. Quin Cure identical with Cure Quinine at much more economical.

Brown, p. 122, 3. Quin Cure equally good as Cure Quinine—it could be dispensed and sold as Cure Quin.

Hall, p. 124, 1. Former salesman of Pelletier-Caventou-Jacquelin Quin Cure was same drug in chemical contents as Cure Quinine now, (1879) but cheaper. Could and sold it (1879) substitute for Cure Quinine and was drug.

Brown, p. 125, 3,141. Quin Cure same preparation as Cure Quine at a less price.

Brown, pp. 127-8, 3,2 and 13. Quin Cure identical and same purpose as Cure Quinine.

Brief, No. 31.

Bell, pp. 111-3,598, 3,599. Quin Cure same preparation as Cure Quinine and cheaper.

Bindon, p. 528, Q8. No rule for Quin Coro.

E. H. White, p. 533, Q5 and p. 532, Q9. Heard Wilkins, Petitioner's solicitor, offer Whitley Quin Coro, stating could he used as Coro Quinto and at less expense and a saving on original Coro Quinto.

W. G. Watkin, p. 565, Q5. Quin Coro cheaper and could be dispensed where Coro Quinto specified.

Calvert, p. 569, Q8., p. 570, Q4 and 5. Quin Coro mentioned and used in the event.

Studley, pp. 608-09, Q47-53. Quin Coro cheaper and could be sold under label of Coro Quinto.

Weiss, p. 646, Q18. Exceptionally using Quin Coro when Coro Quinto was prescribed.

J. C. White, pp. 650-651, Q2-9. Quin Coro same as Coro Quinto and cheaper.

Sinclair, p. 690, Q43-8. Quin Coro same as Coro Quinto and cheaper.

Powell, pp. 695-696, Q48-51. Quin Coro just as good as Coro Quinto prescription.

Lawson, p. 699, Q8. Quin Coro same as Coro Quinto and could be used as substitute in any exception for Coro Quinto, were filled with Quin Coro. [6 p. 699, Q questions] Witness advocated Quin Coro for Coro Quinto and was told he could do so.

Barry (should be Berry), pp. 710-715, Q46-51. Quin Coro was same as Coro Quinto.

McCabe, p. 816, Q5. Quin Coro could be used for Coro Quinto [6-10 only as substitute. W. p. 816, Q37. Defendant's witness recalled refuses Q. use Quin Coro as substitute.

James, pp. 866-68, Q42 and 5. Defendant's witness said "Coro and Quin Coro quite the same."

The net result of this testimony, therefore, is that of the forty-one witnesses enumerated, only seven testified to statements made by Defendant's witnesses to the effect that Quin Coro could be sold in substitution for Coro Quinto, when the latter was prescribed or called for.

The remainder only referred to statements of such facts as that Quin-Coco was better or cheaper than Cure-Quinine, and could be used in its stead. There were either single truths or matters of opinion. As to the eleven witnesses above referred to, their testimony is dealt with by Petitioner as follows:

Name.	Principal Brief.	Reply Brief.
Rice	59	61
Jones, W. S.	60	—
Jolly	59	—
Groves	60	59, 59, 61, 60, 60
Hardy	60	5, 8, 59, 61, 60
White, E. H.	60	59
Watkins, W. G.	60	5, 59, 59, 61
Hughey	60	59
Moss	60	—
Lawson	60	59, 60, 61
McCorkle	60	60

V.

Respondent failed to establish substantial injury by Petitioner's selling methods.

Respondent's claim that Petitioner's methods complained of resulted in successfully building up a large trade in Quin-Coco, as contrasted with the earlier conditions (p. 49) that Petitioner had failed to establish a market for his product. (If true the testimony amounts to [illegible] but the record on [illegible] recollections and not druggists called for Respondent, have nothing more than [illegible]). The thousands of druggists throughout the country who bought Quin-Coco to keep [illegible] were not called. The burden was upon the Respondent and Petitioner is above cable by Petitioner's [illegible] quantity to injure Respondent's business. [illegible] number of Petitioner who testified [illegible]

Respondent, produced slips of his own sales showing the following amounts sold:

1907	$370.15	
1908	307.25	
1909	451.85	
1910	499.55	(Rec., Vol.
1911	642.30	II, pp. 364-
1912	564.25	6.)

Although Kelton ranked third on the list of Petitioner's salesmen, there, third best in the aggregate volume of sales of all Petitioner's products (p. 606) and was generously encouraged by Petitioner (see also pp. 606-622), (a) it should be noted that in our letter his attention was called to the fact that his past-due accounts, including offset and items charged to profit and loss in 1907, amounted to $7,394, as compared with the previous year, $1,622; (b) that his increased business had been entirely exhausted by his increased past-due accounts (p. 606), and (c) would seem to account for the difference between the amount of his orders and the amount actually received for Quin-Coca during the years 1907 to 1911, shown in the tables printed on pages 608 to 609 of the Record. Testimony shown by him to answer the simple query of what compensation he was getting for the work for the Respondent is lacking on witnesses to his car (see Rec., Vol. II, p. 631, Tyler to p. 636, Cobb); a notion which was finally answered by Respondent's count (Cobb, pp. 637-8), requires the use of caution in considering his other testimony, although there is no reason which is furnished by the testimony of Mr. Cobb, Petitioner's assistant sales manager, that he had any knowledge from Petitioner's employees of questionable conduct (see Rec., Vol. III, pp. 1356-8).

The testimony of the other witnesses commented on [illegible] of a [illegible]

Grigsby, Rec., Vol. I, p. 97, Q16, had never sold Quin-Coco.

Griffin, p. 164, Q11, had seen three unopened bottles of it.

Burns, p. 170, Q11, had seen it on the druggist's shelves.

Porter, p. 177, Q[illegible], was selling five gallons of Quin-Coco to one of Coco-Quinine.

Fowler, p. 208, Q6-8, said a good deal of it was sold, because he saw it on the shelves.

Wetzel, p. 216, Q4, 7, had seen it in 40 per cent. of the drug stores.

Bell, p. 211-12, Q5, 6, said it was used in three-quarters of the drug stores in his district.

The testimony of Tisdale (p. 248, Q8) and Vinson (p. 257, Q5-6) was vague and indefinite, and that of Fly (p. 228, Q10) was purely hearsay, to the effect that many times in soliciting business from retail buyers in his territory he was asked by buyers why they should buy Coco-Quinine at $4.80 per gallon when they could buy Quin-Coco for $2.50.

Conclusion.

Conclusive testimony was introduced which is summarized on pages 59-63 of Respondent's brief, showing how Respondent created a demand for its products in the trade by what it calls "dental work," and complaint is thus made that Petitioner's efforts were directed more towards supplying a demand created by others than in creating any demand of its own for its products.

This is nothing more than contending that the owner of a trademark of the right accorded by both the District Court and the Circuit Court of Appeals to manufacture and sell the product according to the formula to which the Respondent had no exclusive right, was, notwithstanding the determination of those two courts, en

invasion of Respondent's rights. Respondent quotes a portion of an answer given by Mr. G. A. Plimpton, Petitioner's Treasurer and General Manager, to the effect that formerly "detailing" was considered the only method of introducing new specialties, and that it was an efficient method, but that the expense of personal detailing was so high as in many cases to make it unprofitable. He does not quote the remainder of witness' answer, which was:

> "I would say the practice of personal detailing with samples has diminished a great deal in recent years" (Rec., Vol. III, p. 1220).

Respondent refers to the testimony of what is described as "a multitude of druggist witnesses," to show that Petitioner never attempted to create a market for its own preparation, Quin-Cinco, either on its merits or under its name—which is rather surprising in view of the amount of testimony previously to the contrary. It is admitted, that a number of druggists were produced by Respondent's 140 witnesses residing the entire country for some five years, to say that they at least had had no demand for Quin-Cinco. But that is too few to be persuasive, and negative testimony seldom gets anywhere.

Besides, there were the 65,000 druggists-doctors who bought and dispensed their own drugs (mostly county doctors), and the Petitioner is shown (Principal Brief, pp. 46, 50) to have solicited their trade. It appears that the Respondent solicited the prescribing doctors (65,000) and the Petitioner solicited the dispensing doctors (65,000), as well as the entire retail drug trade. Where lies any difference in respect of "attempting to create a market"?

Perhaps the most impossible contention of Respondent is that as Quin-Cinco was ever formally sold, but not at "cannot sell" an instrument that is to a creating a new

but for Quin-Coca, Principal Brief, page 86. It would seem that, in the opinion of the Respondent, the retail drug trade have not only forgotten honesty but are ignorant of how to sell drugs.

The Respondent's Brief at page 87, contains statements as to "instances of actual substitution shown by the Proofs." By this it is assumed that "*passing off*" is meant. The testimony of only eleven witnesses is there discussed. We assume that these are considered by Respondent to be its best witnesses. Certain other witnesses are merely named in a group at page 70. We will take up the eleven best witnesses:

Hooper and Martin, fully unknown, once saw a Coca-Quinine prescription filled with Quin-Coca. Wright had sold Quin-Coca when Coca-Quinine was called for at his drug store, but not on prescriptions. He said Pettibone's representative had told him he could sell it same as Coca-Quinine. There was no distinction. Russell, a bystander, confirmed Martin. Messenger, a fully unknown, said "I know it to be a fact that lots of druggists serve a substitute of Coca-Quinine called Quin-Coca, but buy used on prescriptions where the physicians had written for Coca-Quinine." Broussard, a fully unknown, on one occasion saw a prescription for Coca-Quinine filled out of a Quin-Coca bottle. He refused to name the druggist. Griffin, a fully unknown, had seen Quin-Coca "the ground in a good many instances when Coca-Quinine was ordered," but he specified only one instance.

Three druggists were mentioned:

Swanton had sold it as Coca-Quinine only.

Bullard had sold it when Coca-Quinine was called for.

Gibbins produced a bottle which he had but the druggist as Coca-Quinine. Gibbins testified that the particular druggist did not on that day have any Coca-Quinine in stock.

Hess, testifying four or five years after a conversation with Jones, Petitioner's salesman, couldn't recollect the exact words, but stated that he said physicians were buying a lot of Quin-Coco for use in their practice, thereby making more money than by buying Coco-Quinine and getting the same results (Rec., Vol. 2, p. 203, 5/23/39).

There follow the mere names of a group of witnesses, each of whom is said to have testified that he had sold Quin-Coco or Coco-Quinine pills.

As to the witnesses not named above who are cited (Respondent's Brief, pp. 70-71) as supporting instances of actual "passing off," their testimony at the places in the record indicated by Respondent may be summarized as follows:

Stovall, filled calls for Coco-Quinine with Quin-Coco.

Albright, sold Quin-Coco on prescription for Coco-Quinine.

Shepherd, used Quin-Coco in dispensing Coco-Quinine.

Daly, had bottles of Quin-Coco labeled Coco-Quinine.

Reid, sold Quin-Coco on calls for Coco-Quinine.

Hall, in one instance saw a clerk in a drug store bottling Quin-Coco and labelling it Coco-Quinine.

Garber, dispensed Quin-Coco on calls for Coco-Quinine, labelling it Coco-Quinine.

Lindsey, Hardy and Garner sold Quin-Coco in bottles labelled Coco-Quinine.

Turner, used Quin-Coco on prescriptions for Coco-Quinine, 5/39.

Whitley, dispensed Quin-Coco on prescriptions and calls for Coco-Quinine and sold it over the counter.

White, sold Quin-Coco in bottles labelled Coco-Quinine.

Walker, and Stuckey filled prescriptions for Coco-Quinine with Quin-Coco.

Burns, and Powell filled prescriptions for Coco-Quinine with Quin-Coco as did Lawton and Lowell.

That Petitioner has a right to market Quin-Coco has been affirmed by both the lower courts, and all the authorities are in accord. That its bottles and labels were not imitations, is not questioned. Unless, therefore, the selling methods were unlawful, the acts of third parties—"trade retailers"—do not affect the Petitioner.

So much for the *grounds* on this point.

But no matter what any Richmond druggist may have done, it cannot affect the Petitioner, and the evidence is quite immaterial, for the rule is well settled that a manufacturer is not responsible for the acts of dishonest retailers in "passing off" his goods, provided it has done its legal duty in respect of its product.

Saltzman v. Champion Steel Range Co., 189 Fed., 26, C. C. A., 8th Circ. Unfair trade case on the sale of natural gas heaters.

Lochren, C. J.:

> "There is some evidence tending to show an actual deception of customers on the part of dealers to representing defendant's heaters as that of complainant. * * * So far as concerns actual misrepresentation by dealers of the identity of heaters, not only is the proof thereof not highly convincing, but defendant is not responsible for the bad faith of the retailers employed to make *[sales]* as that of complainant, provided defendant has done its best duty in distinguishing its own product from that of complainant. *Royal Typewriter Exchange Co. v. Wright*, 65 Fed., 932; *Hall's Safe Co. v. Herring & Co.*, 146 U. S., 88."

Case Title (Co. v. *Brandon*, 310 Fed., 304, 305, D. C., E. D. Ohio.):

STATEMENT, D. J.:

> "*Defendants cannot be held responsible for what their customers did without aid, suggestion, or inducement from them.*" (Italics ours.)

Again we must point out what an inhabitated number of druggists were called in this connection—out of 60,000 druggists in the country, and the country was fairly scoured for witnesses by the full talents of the appellee.

These proceedings and the broad averments of fraud in the bill are really an attack on the good character and standing of the entire retail drug trade. It is really "indicting a whole nation." This subject has been referred to in Petitioner's Brief, page 68.

In no single instance of all these witnesses, except Brandon, was it proved that the druggist had not informed the physician or his counter customer that he had not given him Unc-Quinine. It is submitted that without that complete proof of the offense the evidence is insufficient. The charge is a serious one; the proof of it fails if it be not complete.

But again, even complete proof of "passing off" by druggists does not affect the Petitioner. It is not alleged, nor is notice the main issue here involved, that the Petitioner's salesmen authorized or requested "passing off" is sufficiently proved. That proof has been entirely the "pass off" is not of itself evidence that the Petitioner's salesmen requested or took direct parties that they could connect that fraud on the public. The conduct of the salesmen can be proved only by direct evidence on that point.

In other words, there is no evidence (unless that of Brandon) that any customer of a druggist was actually deceived. It can exist that the customers were not misled

[illegible] [illegible] [illegible] [

"implicated" various of petitioner's salesmen, are negligible. Many or most of them have been referred to in the Principal Brief. A few of them may require further consideration in this particular connection or a reference to other parts of this brief or of the Principal Brief, where their testimony is treated.

As to Jones: Richard's testimony, as quoted at page 96 of the Principal Brief, did not implicate Jones in any improper selling method.

As to Wilkins: W. G. Walker, a clerk in the drug store of Whitley, was called to corroborate the evidence of the latter. The following is his testimony:

> "Q. Did Mr. Wilkins ever solicit your order for a preparation called Quin-Coco, and if he did, what did he say to you respecting this item?
>
> By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully gone into in plaintiff's *prima facie* case.
>
> A. He did." (Rec., Vol. II, p. 541.)
>
> "XQ16. When was it that Wilkins solicited the order for Quin-Coco as you have testified? A. About April, 1911.
>
> XQ17. Who was present? A. Dr. Pankey and Mr. Whitley" (*id.*, p. 543).

If this evidence is to be considered at all, it should be observed that witness testified August 12, 1916, to a conversation which he says took place in April, 1911 (XQ16), which lasted "only a few moments" (XQ19), on the subject of one article (Quin-Coco) out of Warner's entire line of pharmaceuticals (XQ20). Witness was merely a bookkeeper. It is hard to believe that Wilkins, with five thousand items to sell, should have gone elaborately into the merits of a single one, when the druggist already had a good stock of it on hand and needed no

more at the time (XQ22). The testimony was obviously not based upon recollection but upon inference.

As to Starring: M. A. Kessel testified only as to what two Warner salesmen had said to him in offering to sell him Quin-Coco. As usual, the gist of his evidence came out on cross examination, and it is all that need be considered. Thus:

> "XQ32. When Rogers asked you to buy Quin-Coco did he say that it was *similar* to Coco-Quinine, contained the same amount of quinine—two grains to the teaspoonful—and that the price was lower, and *is that the substance of what he said?*
>
> By Mr. Bradford: Objected to as an inaccurate statement of what the witness has already testified to, and as an improper question for this reason.
> A. Yes, sir.
>
> XQ33. And is *that the substance of what Starring afterwards said?*
>
> (Same objection.)
>
> A. Yes, sir." (Rec., Vol. II, pp. 738-739; italics ours.)

This does not "implicate" the Warner salesmen.

As to Rogers, said also to be "implicated" by M. A. Kessel, see Kessel's testimony just quoted, XQs38 and 39.

Rogers (Vol. III, Qs6-22, pp. 1603-5) and Starring (Vol. III, Qs26-29, pp. 1608-9), the petitioner's salesmen, were called and denied Kessel's statements.

As to Gonzales: Barnes' testimony was specifically denied by Gonzales, to whom he imputed the dishonest suggestion (Vol. III, pp. 1361-2 and 1366).

Ray's testimony is sufficiently considered at page 53 of the Principal Brief.

As to Wilson: McCorkle (Principal Brief, p. 105) and James (*ibid*, p. 106) show that Wilson made no improper statements.

The testimony of McCorkle and James was taken out of order and was objected to.

As to Devall: Scott's testimony that Devall represented that Quin-Coco could be sold and dispensed as Coco-Quinine Lilly (Rec., Vol. I, p. 114) was squarely denied by Devall (Rec., Vol. III, p. 1387).

As to Kelton: It is fully shown in the Principal Brief that Kelton, though originally a Warner salesman, was called as a star witness by the Respondent, but that he testified that his selling methods had been beyond reproach, and his testimony in this connection requires no further comment.

The testimony of Petitioner's former salesman Groves, referred to on Respondent's brief at page 84, properly analyzed, shows that when asked to state what Hagaman said to druggists, Groves replied that Hagaman said "Quin-Coco was a similar product to Coco-Quinine, containing the same amount of quinine and was light in appearance." That was all he said (Rec., Vol. I, p. 368, RXQs95-97). In his comment on the testimony of McNulty (pp. 86-87), which related not to Quin-Coco but to Castoria (Rec., Vol. II, p. 449), Respondent entirely ignores the fact that the testimony of Peabody was squarely denied by McNulty and was entirely uncorroborated (Rec., Vol. III, pp. 1565-7). Likewise Lavison's testimony cited on page 87, concerning an interview with Mr. Kelton, former employee of Petitioner, and Mr. H. Pfeiffer, was denied squarely (Rec., Vol. III, p. 1245). There was no corroboration of it and Lavison's testimony was greatly weakened on cross-examination as follows (Rec., Vol. II, p. 695):

"XQ32. And I understood you to testify above that Mr. Henry Pfeiffer told you that Quin-Coco was the same as Coco-Quinine and you could use it for Coco-Quinine in any way that Coco-Quinine was used, and that it was the same thing and much cheaper. Is that correct? A. It is.

XQ34. Can you give the language of Mr. Pfeiffer in the words in which he spoke? A. I do not know that I can give his exact words. I know that he told me that it was the same as Coco-Quinine, identically the same, and the difference could not be told, and that it could be used in any way that Coco-Quinine was used.

XQ35. That is, that they were the same preparations, pharmaceutically. Is that correct? A. That they were the same preparation in every way.

XQ36. And his was cheaper? A. And cheaper; yes, sir.

XQ37. And that is the substance of what they both told you? A. It is."

Culver's testimony, quoted Respondent's Brief, page 90, respecting his dealing with Jones, one of Petitioner's salesmen, was contradicted by Jones squarely at Record, pages 1612-13, and Respondent's counsel did not attempt to cross examine him.

The testimony of the long list of witnesses enumerated on pages 92-3, is to the effect that they handled the product known as Coco-Quinine, knowing it to be the product of Eli Lilly & Co. of Indianapolis. Inasmuch as they all testified that they bought that product from Lilly, it is not strange that they recognized it as manufactured by that firm and the stage army of witnesses enumerated amounts to nothing more than a demonstration of the fact that the purchasers from that house acknowledged that what they bought from it was sold by it! The basic fallacy of much of the argument of the Respondent lies in the generalization that the experience or one or more small retail druggists is indicative of the nature of the entire business of druggists throughout

the United States. So the list of doctors and druggists on pages 94 and 95 amounts to nothing more than that physicians who desire to prescribe Coco-Quinine, when they write that word, mean the Coco-Quinine manufactured by Respondent. As that is the only Coco-Quinine on the market, it would not seem to require the testimony of many witnesses to establish the fact. So the testimony of the witnesses enumerated on page 97, some seventeen druggists, is merely to the effect that when calls were made on them for chocolate quinine, they interpreted it as calling for Coco-Quinine and when Coco-Quinine was called for, they understood that Lilly's preparation was wanted. Many other witnesses, on the other hand, testified that when chocolate quinine was called for, they filled the order with Quin-Coco, as naturally they would have a right to do. So that testimony is of no value whatever. Respondent rarely refers to the fact that any of the testimony upon which his argument is based was controverted by any other witness. It is a very simple and easy method of building up a case to refer only to testimony of Respondent's witnesses, treated as though that were the final word of ultimate truth, and wholly ignoring the fact that other witnesses, equally credible, have testified directly in contravention of the particular evidence relied upon.

N. K. Fairbank Co. v. *R. W. Bell Manfg. Co.*, 77 Fed., 869, 877, C. C. A., 2nd Circuit: Before SHIPMAN and LACOMBE, C. JJ.

Unfair trade case in soap powder. The defendant put up its soap powder in a style of package so similar to the dress of plaintiff's soap that unscrupulous dealers might pass off defendant's package for plaintiff's. But, in considering the evidence of one of plaintiff's witnesses, LACOMBE, C. J., said:

> "A grocer in Wilkes Barre, Pa., testifies that defendant's salesman, as an inducement to pur-

chase, called his attention to the similarity of the packages, and the possibility of passing off one for the other. *The salesman contradicts this statement, and we give no weight to it.*" (Italics ours.)

Montgomerie v. *Young Bros.*, 21 Rep. Pat. Cas., 285:

In the Scotch Court of Sessions (Outer House), before Lords Justice Clerk, Young and Trayner:

Bermaline Bread. The plaintiff employed detectives to trap the defendant.

Lord Young (p. 292):

"I do not accept the evidence of detectives and employes of the description I have referred to, when contradicted by the evidence, *which I accept as honest and truthful evidence, of the servants in the shops of the Defenders.*" (Italics ours.)

The employer had forbidden the sales complained of.

Lord Young (*ibid.*):

"I cannot agree to the proposition that if a servant disobeys the master's instructions in a matter of this kind, the interdicting of the master is the remedy."

This was a case of "a servant in a shop violating accidentally or otherwise the instructions of her master."

Lord Trayner (p. 293):

"*The servants in the Defenders' shops were unanimous in stating not only that they had got the instructions from their masters, to which I have already referred, but that they were careful to keep these instructions in view and obey them, and they say they did.*" (Italics ours.)

Hostetter Co. v. *Comerford*, 97 Fed., 585, D. C., S. D. N. Y.

This was an unfair trade case upon an allegation that the defendant had refilled bottles with bogus Hostetter Bitters.

Coxe, D. J., in dismissing the bill, placed stress on the fact that *"the defendants and all of their employes deny in the most emphatic manner that they ever refilled empty bottles with bogus bitters."* (Italics ours.)

The District Court rightly characterizes Respondent's testimony as follows:

> "But the testimony in most instances consists rather of impressions of witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses, upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions" (Rec., Vol. III, pp. 1650-1651).

Thus, for example, the testimony of the witness Thurman, as to what he said to Garvin and Merner, referred to on page 108, was squarely denied by each of them (see Rec., Vol. III, pp. 1239-1240). The other testimony referred to immediately following that of Thurman, concerning the "blue list" was of little account. Hooper, Groves and Perine recognized the document; Hardy and Kuhn had one similar to it; Thurman was familiar with it; the list had been presented to Peabody; Bolenbough recognized the list and had one when in Petitioner's employ; O'Connell had such a document and said that Hagaman used it to demonstrate the Warner lines to show the similarity of their goods with other well-known makes (Rec., Vol. II, p. 975).

The Respondent's Brief at various places attacks the commercial and moral standing of the Petitioner

William R. Warner & Company, one of the leading drug manufactory houses of the country. The statements made have no fitting place in an argument before this Court. They are entirely unjustified by anything in this Record. On the contrary, one of the Respondent's own witnesses, Thorburn, Pharmacist in Pitman-Moore Company for many years, testified (Rec., Vol. I, p. 34):

> "XQ26. Mention some of the leading drug manufacturers in the country. A. Parke Davis; Sharpe & Dohme; John Wyeth & Co.; H. K. Mulford & Co.; W. R. Warner & Co.; Eli Lilly & Co., selling a general line of pharmaceuticals."

U. S. McClellan (Rec., Vol. III, p. 1418), a witness for Petitioner, General Manager of a St. Louis drug manufacturing concern, testified (Q8) that he had known William R. Warner & Company ever since he could remember. That he considered it one of the "oldest and reliable concerns in the country."

It is true, as stated by Respondent, that William R. Warner (father) died before 1908. He died many years before that. His son, William R. Warner, continued the business and is today one of the largest stockholders of the Petitioner Company, and a director.

Document No. 3: The Blue List.

This was merely a convenient list of certain Warner drugs carried by salesmen. It was a competitive list. It had not the slightest moral significance; and yet it was produced early in the taking of proofs and was greatly depended upon throughout by the Respondent.

The Respondent's brief refers to it at page 106, where it appears that the Respondent had its own list of "Competitive Preparations," being "a list of proprietary or semi-proprietary articles made by other manufacturers followed by the name of a competing preparation made

by ourselves." Mr. Lilly (*ibid.*, p. 111) testified that "it was for the information of our salesmen and detail men." Well, that was the obvious purpose of Petitioner's "Blue List." They both were intended to serve the same purpose, and both were perfectly honest. But it is strenuously argued by Respondent that the purpose of the Blue List was malign, while that of the Respondent was "innocent." Lynn testified that as soon as he knew of this list he discontinued it; but Mr. Lilly, the President of Eli Lilly & Company, talks very differently (p. 111 of Respondent's Brief), where he stands up for it and does not say it was withdrawn. How can these two entirely similar lists of goods carried by salesmen appear so different to different eyes?

It would seem needless to prolong this discussion. The evidence is voluminous. Our conviction is that the views of the District Judge respecting it are sound, and will be confirmed by this Court upon a perusal, not of all of the record, because that would seem to be unnecessary, but of some of the distinctive portions of it to which reference is made in the briefs. Judge THOMPSON said, referring to the charge of dishonest passing off of the product of Petitioner upon the customers of the Respondent:

> "The evidence upon this point has been carefully examined. In a charge of this nature the testimony could [should?] be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of the statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to defendant's salesmen, the salesman upon being called denied ever making such suggestions.

> "The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen." (Rec., Vol. III, p. 1650.)

It seems to us that the Circuit Court of Appeals must have accepted the testimony of Respondent's witnesses without close analysis, and that if it had scrutinized and weighed the testimony with the care of the District Judge, it must have reached the same conclusion that he did.

For the reasons above stated, we respectfully urge that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed.

April 11, 1924.

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